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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 580

KENNETH A. MAKEKAU and YOICHI TAKAHASHI,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

Kenneth A. Makekau and Yoichi Takahashi,	*Petitioners,*
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United States of America,	*Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners Kenneth A. Makekau and Yoichi Takahashi pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered July 22, 1970, the Motion to File Additional Briefs and to Reopen Argument having been denied on August 5, 1970.

OPINIONS BELOW

The decision of the United States District Court for the District of Hawaii on petitioners' motions to dismiss and suppress testimony is not reported and is contained at Record 91-115.

The opinion of the United States Court of Appeals for the Ninth Circuit is contained in an as-yet unpublished opinion dated July 22, 1970.

JURISDICTION

Petitioner Takahashi was on April 24, 1969, convicted in the United States District Court for the District of Hawaii on three counts of violating Title 26 USC §4704(a). On the same date defendant Makekau was convicted in the same Court on three counts of violating title 26 USC §4704(a) and three counts of violating Title 21 USC 174. Judgment and commitment was entered in the said United States District Court on May 19, 1969.

Petitioners' motions in the trial court for judgment of acquittal and new trial or alternatively to vacate the verdict of guilty were denied on April 29, 1969.

These judgments the petitioners appealed to the United States Court of Appeals for the Ninth Circuit. An order denying petitioners' appeal was entered on July 22, 1970. The time of entry of the order of the United States Court of Appeals for the Ninth Circuit dated July 22, 1970, is not known.

The petitioners' motion to file additional briefs and to reopen argument based on newly discovered evidence was received in the Ninth Circuit Court of Appeals on July 10, 1970, filed July 24, 1970 and denied August 5, 1970.

The jurisdiction of this Court is invoked pursuant to 28 USCA §1254-1.

QUESTIONS PRESENTED

1. Whether petitioners' rights under the Sixth Amendment of the Constitution of the United States to effective assistance of counsel were denied when the trial court restrained petitioners and their counsel from contacting or attempting to contact the principal material witness and informer Harold Takashima.

2. Whether petitioners' rights under the Sixth Amendment to the Constitution of the United States to be confronted with witnesses against them were violated when the trial court allowed the case to go to trial without the informer Harold Takashima upon whose activities their convictions were based.

3. Whether the government's ex parte release of the informer Takashima from protective custody constituted a deprivation of petitioners' right to due process of law under the Fifth Amendment.

4. Whether due process of law requires that petitioners be granted a new trial now that the material witness has been located and is available for interview and cross examination.

3. Whether the privilege of the Social Security Administration authorized by 42 USC 1306, to refuse to disclose to the U.S. Justice Department information within its files which would have led to the production of the material witness at trial, must give way to petitioners' constitutional right to confrontation under the Sixth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Code:

21 United States Code §174;
26 United States Code §7041(a);
42 United States Code §1306.

Constitutional Provisions:

United States Constitution:

Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime; . . . nor be deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On August 28, 1967, petitioners were each charged in a six count indictment in the United States District Court for the District of Hawaii, with three counts of the sale of narcotic drugs to an unnamed person, in violation of 21 USC §174, and three counts of distributing said drugs not in the original stamped package, in violation of 26 USC §4704(a).

On October 5, 1967, petitioners' motion for bill of particulars as to the name of the vendee (later determined to be an addict turned informer) was granted and the name of Harold Takashima was revealed by the government. That part of the motion requesting his address was denied. In granting the motion, United States District Court Judge Martin Pence entered an order restraining petitioners and their counsel from directly or indirectly contacting or attempting to contact Harold Takashima, the informer to whom they allegedly sold these drugs. (Appendix M.) The informer was then placed in the protective custody of the government, his whereabouts and supervision unknown to petitioners or their counsel.

A preliminary hearing was not held in this case, although had it been, it would have been held at a time when Takashima was within the geographical limits of the State of Hawaii, in the control of the government, and would have afforded at least some rudimentary cross-examination rights to petitioners.

Briefly, the informer Takashima had been arrested on a federal warrant on March 18, 1967. He and his

wife were charged with the sale and possession of heroin. At the time of his arrest he had already three narcotics convictions on his record, was heavily addicted to heroin and had numerous other criminal convictions extending back some twenty two years. Mrs. Takashima was likewise an addict but with no known criminal record.

Thereafter, under some sort of an arrangement with the Federal Government, between April, 1967 and July, 1967, Takashima actively purchased narcotics at the request of the United States Bureau of Narcotics and Dangerous Drugs and the Honolulu Police Department from various alleged suspects against whom the government was trying to make a case. When his usefulness had ended, he was turned over to the State of Hawaii for prosecution, where by pre-arrangement on July 28, 1967, he was indicted and pleaded guilty to one count of possession of heroin, receiving a suspended sentence on condition that he be admitted to the United States Narcotics Hospital at Fort Worth, Texas. While at the hospital, he was placed in protective custody of the Federal Government. No federal charges were ever brought against either him or his wife. (Mrs. Takashima was murdered on or about September 15, 1967 by persons unknown to this date.)

On November 3, 1967, the government obtained an ex parte order from a visiting Federal Judge, without notice to petitioners, which released Takashima from protective custody. He was then released from the Fort Worth Narcotics Hospital where the gov-

ernment had been keeping him, and allowed to return, unsupervised, to the Los Angeles area where he took up residence at 241 E. Second Street, Los Angeles. He stayed at that address from November, 1967 to January, 1968, and then moved across the street to 305 E. Second Street, Los Angeles, where as it later developed he has been to the present day. Both of these addresses are within three blocks of the U.S. Bureau of Narcotics and Dangerous Drugs office in Los Angeles in an area known locally as "Japtown".

Thereafter when the case was moved for trial on November 22, 1967, petitioners filed a motion to produce respondent's witness, Takashima, for interview by petitioners' counsel prior to trial, under such circumstances as the trial court might prescribe, which motion was granted in chambers on November 27 and 29, 1967. (Appendices H, I and J.)

On November 29, 1967, the government represented to Judge Pence and petitioners' counsel that it still had Takashima in custody and promised both the court and counsel for petitioners that it could and would produce him. The case was set for trial February 21, 1968. (Appendices H, I and J.)

On January 18, 1968, petitioners' counsel went to Los Angeles to interview Takashima in accordance with Judge Pence's order for his production by the government prior to trial. This interview had been arranged by the government pursuant to Judge Pence's order to produce the informer during the week of January 15, 1968. Counsel for petitioners

arrived at the Los Angeles office of the U.S. Bureau of Narcotics and Dangerous Drugs at the appointed hour. After a half-hour wait petitioners' counsel was informed by a U.S. narcotics agent, Francis Briggs, that Takashima could not be located and a "search of the hotels and bars in Japtown had failed to locate him".

Petitioners then filed motions to dismiss the indictment and to quash testimony of those government witnesses whose evidence would be based upon Takashima's activities unless Takashima was produced as a witness. These motions were denied by Judge Pence on February 24, 1969.

Between February and October, 1968, hearings were held during which the alleged efforts of the government to locate Takashima were detailed by the government. The order restraining petitioners and their counsel from contacting or attempting to contact this missing witness was not vacated until May 1, 1968.

Immediately following the vacating of the restraining order, petitioners' counsel and an investigator employed by him endeavored to turn up leads to Takashima in the Los Angeles area, but were unable to find anything regarding his whereabouts after January of 1968.

On April 22-24, 1969, petitioners were tried, petitioner Takahashi being convicted of three counts of violating Title 26 USC §4704(a) by selling narcotics to Takashima and Makekau being convicted of all six counts involving the sale of drugs to Takashima.

The evidence against petitioners consisted primarily of the testimony of a narcotics agent, John Y. Y. Lee, who in substance testified that he met with Takashima on three separate instances, superficially searched him, gave him money in unmarked bills and sent him to meet with petitioners. Takashima drove in his own automobile to a meeting place with petitioners allegedly arranged by a telephone call by Takashima. Lee followed Takashima's car to the meeting place, but did not observe any transfer of narcotics between petitioners and Takashima. On Takashima's return to the original meeting place, Takashima had no money on him but had narcotics on his person. The arrest of petitioners took place some three or four months after the alleged transactions.

Petitioners filed timely motions for judgment of acquittal, for new trial or alternatively to vacate the verdict of guilty which motions were denied. Petitioners appealed to the United States Court of Appeals for the Ninth Circuit which on July 22, 1970, denied the appeals.

On June 15, 1970, while the appeal was pending, petitioners' counsel was advised that Takashima had been found in Los Angeles where he had been arrested for petty theft.

On June 19, 1970, petitioners filed, in this case, a petition for writ of mandamus or alternatively for extraordinary relief in the United States Court of Appeals for the Ninth Circuit asking for the immediate arrest of Takashima so that he could be interviewed by petitioners' counsel. This petition was as-

signed a new number and denied on June 29, 1970. (Appendix F.)

On July 10, 1970, petitioners then filed their motion to file additional briefs as before indicated and in support thereof attached a declaration secured from Takashima on June 23, 1970.

The facts of the declaration showed that Takashima has been living in Los Angeles from November 6, 1967, through the date of the declaration at the addresses before indicated. It further showed that he had been working in Los Angeles at the California Sahiple Company on South Figueroa St. from December 17, 1967, through June 23, 1970, and paying social security taxes on his own social security number 576-18-3436. (Appendix G.)

On September 3, 1968, at the request of petitioners' counsel, the trial Court directed the government to cause the social security records of Takashima to be searched to determine if his social security payments would be a lead to his whereabouts. (Transcript 6, pages 146-147.) (Appendix K.) On October 2, 1968, the prosecutor indicated that this information in the hands of the government would be obtained. (Transcript 8, pages 97-98.) Subsequently, however, the Social Security Administration refused to release this information on the grounds that the social security records were privileged. (Record 83-86.) (Appendix L.) As a result, the one sole lead to Takashima's presence and whereabouts was not explored and the case continued to trial without Takashima.

On these facts petitioners appeal.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURTS BELOW IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Sixth Amendment to the Constitution of the United States provides in pertinent part that: "In all criminal prosecution, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Petitioners herein did not enjoy that constitutional right at their trial, notwithstanding this Court has on many occasions mandated that right to them.

While this Court has on prior occasions decided issues involving the right to confrontation, it has never had before it the right to confrontation where: 1) counsel for defendants has been judicially restrained from interviewing the missing witness at all stages of the proceedings prior to trial; and 2) the government has had custody of the material witness, promised to produce him for trial but for one reason or another did not do so, to the detriment of petitioners' rights.

Further, while this Court has upheld the government's right to rely upon its "informer's privilege" only if it dismisses the indictment, *Roviaro v. U.S.*, 353 U.S. 53 (1957), it has not had before it an issue of whether the indictment must be dismissed when one agency of the government will not disclose the contents of its departmental records to another

agency on the grounds of sanctity or privilege, where the contents of those records, in this instance, those of the Social Security Administration, would have led to the production of the material witness at trial.

In *Pointer v. Texas*, 380 U.S. 400 (1965), the Court held that the privilege of confrontation granted by the Sixth Amendment was not discharged and could not be discharged by the use of a transcript of the preliminary hearing, at which petitioners had no lawyer and, therefore, had no opportunity to cross-examine the principal witness against him, who, since the time of the preliminary hearing had left the state.

On the same day as *Pointer v. Texas, supra*, was decided, the Court decided *Douglas v. Alabama*, 380 U.S. 415 (1965) in which it quoted the following from *Mattox v. United States*, 156 U.S. 237, 242-3 (1895):

> "The primary object of the constitutional provision in question was to prevent depositions or ex-parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony whether he is worthy of belief."

In *Parker v. Gladden*, 385 U.S. 363 (1966), the Court said:

> "As we said in Turner v. Louisiana, 369 US 466, 472-473, 13 L ed 424, 428, 429, 85 S Ct 546 (1965), the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination and of counsel."

Confrontation affords a twofold advantage: first, the opportunity of cross-examination; and second, the personal appearance of the witness and therefore the Court and jury's opportunity to observe and evaluate his appearance, conduct and demeanor. Important significance was attached to these in *Smith v. Illinois*, 390 U.S. 429 (1968).

In this case the government relied for conviction upon the testimony of government agent and witness John Y. Y. Lee relating to the extrajudicial hearsay statements and hearsay activities of Harold Takashima. Petitioners' conviction was clearly based solely upon this testimony and inferences drawn therefrom. Absent Takashima's appearance, there could be no direct evidence as to where the narcotics came from which were attributed to sales from petitioners. Takashima was the key material witness, and in fact the only eyewitness, to the transactions forming the basis of the convictions. The prosecution agreed to produce him, promised to produce him and represented that it could produce him. It did not.

From the facts of the case, it was obvious from the outset that the identity and testimony of Takashima

were vitally relevant to the trial. For this reason his identity was revealed on petitioners' motion for bill of particulars notwithstanding the government's opposition. Thereafter, the personal appearance and cross examination of Takashima was required in order that petitioners would have an opportunity, not only of testing his recollection and sifting the conscience of the witness, but of compelling him to stand, face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gave his testimony whether he is worthy of belief. *State of California v. Green*, 38 L.W. 4579 decided June 23, 1970, at page 4592 (dissent of Mr. Justice Brennan).

In the present case by allowing the government to proceed to trial without the testimony of the witness Takashima, the entire credibility of the government's case at trial rested upon testimony by government law enforcement agents which could only have been rebutted or contradicted by Takeshima. However, he, as the only eyewitness to the transaction, had been released from government control, ex parte, and without notice to petitioners or their counsel, under circumstances rendering his release at least suspect.

In *Barber v. Page*, 390 U.S. 687 (1968) the Court reiterated:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-

examination is an essential and fundamental requirement for the kind of fair trial which is this Country's constitutional goal.

In this case the problem of confrontation could have been eliminated had the government either: (1) retained custody of Takashima until the trial instead of releasing him for his own convenience; or (2) caused his arrest as a material witness on November 29, 1967, when the trial date was set and the District Court ordered his production and appearance for preliminary interview and his testimony at trial; or (3) informed petitioners or their counsel of his impending release on November 5, 1967 so that arrangements might then have been made for perpetuation of his testimony on petitioners' application for his arrest as a material witness.

For one reason or another, no preliminary hearing was held in this case and therefore no opportunity of any sort to cross-examine Takashima was afforded petitioners or their counsel. When his identity was revealed he was forthwith placed in protective custody of the government at a place unknown to the defense, and petitioners and their counsel were judicially restrained by order of the District Court from contacting or attempting to contact him.

He was released ex parte from that custody without notice to petitioners or their counsel, although representations were made subsequent to his release by the prosecution that he was still in custody and that he could be and would be produced to testify at trial and

for examination and interview by petitioners' counsel prior to trial.

The restraining order against petitioners' counsel was not vacated until May 1, 1968, some six months after his disappearance and three months after petitioners filed motions to dismiss the indictments against them. The lapse of time severely restricted petitioners' efforts to locate Takashima. Had the restraining order been vacated when Takashima was released, petitioners would have been free to locate him at his 201 E. Second Street address, or alternatively, had the government commenced its search for him when his disappearance became known, on or about December 3, 1967, it would have found him at that address where he said he was at.

Petitioners respectfully submit that under the circumstances of the case, the government obtained the release of Takashima and thereafter failed to maintain adequate supervision over him following his release with the result that the case proceeded to trial against petitioners without the sole eyewitness essential to an adequate defense over their objections, all in disregard of and in violation of petitioners' constitutional rights to confrontation under the Sixth Amendment and in violation of due process of law under the Fifth Amendment.

II

THE DECISION OF THE COURTS BELOW IS ERRONEOUS AND NOT IN ACCORD WITH THIS COURT'S VIEWS IN LIGHT OF RELATED CASES.

An accused is entitled to the assistance of counsel at all stages of the criminal proceedings against him. The counsel contemplated means effective counsel. *U.S. v. Norman*, 112 F.2d 629 (9th Cir. 1969) at page 631.

In no case reported have petitioners been able to find a circumstance identical to that involved here. In no case was an accused's counsel restrained from interviewing witnesses to the incident, cf. *U.S. v. D'Angiolillo*, 340 F.2d 153, 155 Fn 3 (2d Cir. 1964). Petitioners had but one material witness against them whose testimony was critical and whose credibility was certainly open to speculation. Petitioners' counsel, judicially restrained from interviewing or contacting this witness, could not be the effective counsel contemplated by the Sixth Amendment, or by *Norman, supra*. As has been observed, narcotics addicts are notorious liars where their own interests are concerned. *Fletcher v. U.S.*, 158 F.2d 321 (1946).

This Court has held that both sides have the right to examine witnesses.

> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. A related

development in the criminal law is the requirement that the prosecution not frustrate the defense in the preparation of its case. Information favorable to the defense must be made available to the defense. *Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.ed. 2d 215 (1963). Reversals of convictions for suppression of such evidence, and even for mere failure to disclose, have become commonplace. *Gregory v. United States*, 369 F.2d 185 (CCA DC 1966), at page 188. See also *Pratt v. State*, 270 P.2d 351 (Okla. 1951).

The circumstances of this case present a situation where by judicial action the petitioners were deprived of the effective assistance of counsel. The restraining order precluded them entirely from at any time interviewing the witness Takashima, notwithstanding that petitioners were duly diligent in requesting his presence. The prior decisions of this Court in *Mattox v. U.S.*, *supra*, *Pointer v. Texas*, *supra*, *Barber v. Page*, *supra*, and most recently, *State of California v. Green*, *supra*, lead inexorably to the conclusion that where the accused is denied the right to confrontation at trial of witnesses against them or the right to call those material witnesses as their own, and where, as here, their counsel has been hamstrung in the preparation of their defense because of inability to interview those material witnesses, the conviction of those accused has not been by due process of law as heretofore defined by this Court.

In *Roviaro v. United States*, *supra*, the Court recognized the necessity for the disclosure of an inform-

er's identity and the contents of his communications in order that he may testify at trial. In that case the government's continued assertion of the informer's "privilege" would be held to result in the dismissal of the action. Parenthetically, in the present case, it developed that the government's assertion of its privilege in the sanctity of its social security records resulted in its not finding Takashima, when, as it developed, by search of such records he would have been located in September of 1968 at California Sample Company.

The comments of Mr. Justice Burton at page 63 of the *Roviaro* case are particularly appropriate:

> The circumstances of this case demonstrate that John Doe's possible testimony was highly relevant and might have been helpful to the defense. So far as petitioner knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted. Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he "transported"

from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.

. . . The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the package or might have tended to show an entrapment.

This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses . . .

In *On Lee v. United States* (1952) 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 the Court stated that

. . . without the testimony of [the informer], counsel for petitioner could not develop a record sufficient to raise and prevent the issue for decision, and the courts could not evaluate the full impact of such practices upon the rights of an accused or upon the administration of criminal justice.

It is no answer to say that the defense can call an informer such as [this informer] as a hostile witness. The prosecution may have an interest in concealing his identity or whereabouts. (citation) He may be so undependable and disreputable that no defense counsel would risk putting him on the stand. Moreover, as a defense witness, he would be open to impeachment by the Government, his

> late employer. The tactical possibilities of this situation would be apparent to a prosecutor bent on obtaining conviction. . . . If not required to call the informer, "he may place in the case-in-chief evidence of statements supporting conviction which is not open to impeachment. And if not required to call the informer, he may place on the defense the onus of finding and calling a disreputable witness who if called, may be impeached on all collateral issues favoring the defense. The effect on law enforcement practices need hardly be stated: the more disreputable the informer employed by the Government the less likely the accused will be able to establish any questionable law enforcement methods used to convict him. 220 F.Supp 86 at 88-89.

In the present case the character of the informer, Takashima, including but not limited to his criminal record, certainly falls within the criteria set forth by Mr. Justice Burton as being undependable and disreputable and certainly the Court must look to the totality of the circumstances surrounding his disappearance. This may only be done upon the granting of the writ of certiorari and a full appraisal by this Court of those circumstances and the effect of his non-appearance at trial.

CONCLUSION

For the foregoing reasons, petitioners' petition for writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated, Honolulu, Hawaii,
August 17, 1970.

Respectfully submitted,
STUART M. COWAN,
Attorney for Petitioners.

COWAN, FREY & WILLIAMS,
Of Counsel.

(Appendices Follow)

Appendices.

Appendix A

In the United States District Court
for the District of Hawaii

United States of America, Plaintiff, vs. Kenneth Makekau and Yoichi Takahashi, Defendants.	Criminal No. 12,254
United States of America, Plaintiff, vs. Roy Piiohia, Defendant.	Criminal No. 12,255
United States of America, Plaintiff, vs. Seichi Ikari, Defendant.	Criminal No. 12,256

DECISION

Each of the four defendants in these three cases are charged in from six to eight counts for alleged sales of various quantities of heroin to Harold Takashima (Chico) at various times between April 19, 1967 and July 6, 1967, in violation of 26 U.S.C. 4704(a) and 21 U.S.C. 174.

The three cases were consolidated for purpose of both hearings and this decision. In the case of Makekau and Takahashi (Makekau), counsel Cowan first filed a motion to dismiss the indictment on the grounds: (a) for the government's failure to produce Chico, the government's informer and "buyer" of heroin and presumably principal prosecuting witness, for interview by defendants and counsel, in compliance with this court's order; (b) that defendants' are deprived of due process of law by government's failure to produce Chico for interview prior to trial and at trial (c) that the government has not supplied defendants and counsel with present address of Chico. Later counsel filed a motion to suppress the testimony of United States Bureau of Narcotics agent John Y. Y. Lee, Honolulu police officer Borges, and other government witnesses in the instant case who would testify for the government at trial, maintaining that the government's evidence is based in whole or in part on their testimony of the conduct and activities of Chico "who has been made unavailable by the government . . . to testify in this case."

Counsel for Piiohia filed, verbatim, the same two motions; Counsel for Ikari filed, verbatim, only the motion to suppress testimony.

Findings of Fact

On March 18, 1967, at the request of Borges and other members of the Honolulu police narcotics detail, Lee asked for and was given the assistance of the United States Attorney's office, Honolulu, to secure

a federal search warrant for the home of Chico and his wife Clara in Honolulu. (Tr 5 at 84)[1] The Honolulu police, independently of the Federal Bureau of Narcotics, had secured the information and evidence upon which the issuance of a search warrant was justified but the police had found it difficult, if not impossible, to enlist the assistance of the Honolulu Prosecutor's department in securing search warrants in narcotics cases. So, perforce they had asked for and obtained assistance from the United States Department of Justice. (D's Ex 1 and Tr 5 at 84-87) When the Takashima home was searched pursuant to the warrant, a considerable quantity of loose heroin and heroin in caps was found on the premises. The sum of $1150 was also then taken from the person of Chico. The two, Chico and Clara, were arrested and booked. Lee talked to Chico at his home at the time of the arrest and subsequently at the police station, and secured Chico's agreement to act as a government informer. This defendant-type of recruitment was a normal enforcement procedure. (Tr 5 at 99) On the recommendation of Lee and Assistant U.S. Attorney Ventura, Chico and Clara were released on $1 bond each.

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[1]References herein to Transcripts (Tr) by numbers are as follows:

Transcript 1—Hearing of November 27, 1967.
Transcript 2—Hearing of November 29, 1967.
Transcript 2A—Hearing of February 5, 1968.
Transcript 3—Hearing of February 8, 1968.
Transcript 4—Hearing of June 11, 1968.
Transcript 5—Hearing of August 16, 1968.
Transcript 6—Hearing of September 3, 1968.
Transcript 7—Hearing of September 30, 1968.
Transcript 8—Hearing of October 2, 1968.

Chico had a record as a petty criminal and thief going back to 1943, and as a narcotics law violator from 1954. He was also known to be using heroin himself. Attorney Cushnie was appointed to represent the Takashimas before the U.S. Commissioner. Lee informed Ventura and Cushnie of his efforts to recruit Chico as an informer and secured Cushnie's ~~in~~it approval of the same. (Tr 5 at 91) Lee's only promises to Chico were that if he cooperated in assisting the government, then, while he, Lee, could not guarantee him anything, Lee would, however, bring the matter of Chico's cooperation to the attention of the U.S. Attorney's office and the U.S. Attorney's office would be advised of what Chico was doing. (Tr 4 at 63; Tr 5 at 71-72) Lee knew that both Chico and Clara were unemployed; that Clara was drawing welfare payments; and Chico told him that he was using two caps of heroin a day, during the period Chico acted as an informer.[2] (Tr 4 at 66) Chico also told him that he was geting money from his brother and sister. (Tr 4 at 78)

Although the dates on the receipts placed in evidence (D's Ex 39 and 40), did not substantiate the same, Lee returned to Chico $550 out of his $1150 on March 20, 1967, at the time of Chico's arraignment before U.S. Commissioner Wong, and in April 1967 gave Chico another $550. (Tr 5 at 111-12; Tr

[2]Chico also told others he was using 16-20 caps per day, but the court discounts that figure. He was in Queen's Hospital for addiction treatment but nine days (see *infra*), and when he reported to Fort Worth (see *infra*) he was not on heroin: "Pt [Chico] is inactive. Last narcotics 1 mo. ago." Doctor's Progress notes—9/13/67. (D's Ex "DX2" at 12, attached to D's Ex 4; D's Ex 5 at 21; D's Ex 8 at 61).

6 at 15-17) The last $50 was delivered to Chico on June 9, 1967. (D's Ex 38; Tr 6 at 9-10)

Chico made his first alleged buy as an informant with government funds and under guidance of Lee and Borges, in April 1967. (Incidentally, this allegedly was from Piiohia.) (Tr 4 at 28) He was used thereafter for about fifteen purchases with federal funds in other cases, including those against the four defendants, with the last alleged purchase made July 6, 1967. (Tr 4 at 54-58) The standard modus operandi for narcotics purchases by Chico was the telephone call made by Chico, monitored by Lee or Borges, setting up an appointment to make a buy from a narcotics seller; the search of Chico and his car for heroin; the supplying of government funds to Chico; the tailing of Chico to the rendezvous with the alleged narcotics seller; the *hidden observation* by Lee and Borges of the purported sale, i.e., transfer of money and heroin; the tailing of Chico back to where the call was made; and the delivery of caps of heroin by Chico to Lee, followed by the search of Chico and his car for the government money. (Tr 4 at 29-39)

On May 30, 1967, Chico voluntarily went to the Queen's Hospital in Honolulu for heroin withdrawal and was discharged on June 9, 1967, with dolophine and/or methadon being used for the "few remaining symptoms of withdrawal." (D's Ex 23; Tr 4 at 69)

Lee (or any other government agent) never at any time gave narcotics to Chico nor (except for $10 mailed to Chico in Los Angeles in December 1967, see *infra*) ever gave Chico any money for himself,

Chico was never indicted by the United States for the March 18, 1967 heroin seizures, but on July 20, 1967, he was indicted by the State of Hawaii for that March 18 violation. On July 21, 1967, he pled guilty, and in late August was placed on five years probation by Hawaii Circuit Court Judge Lum (who had been the U.S. Attorney at the time of Chico's arrest in March), sentenced to one year in jail execution suspended on condition that he voluntarily submit himself for treatment at the United States Clinical Research Center in Fort Worth, Texas, for treatment for heroin addiction, Chico to pay for air transportation for himself and an accompanying probation officer. (Tr 4 at 82-83)

Around the end of August Chico reported to Borges that he had received a threatening phone call telling him to lay off or he would get it. Two days later he reported to Assistant U.S. Attorney Ventura that he had received a call from "Joe" who told him to get out of town and not to testify against the defendants; that he would be supplied money to leave but if he testified he and his family would get it. (Tr 3 at 8)[3] Lee, on September 1, 1967, asked Chico if he wished to be taken into protective custody, but Chico refused because he was due to go to Fort Worth on September 11. (D's Ex 11) The defendants in the instant cases were indicted on August 28, 1967, and prior to September 11, when Chico left for Fort Worth, Lee re-

[3] On August 29, 1967, defendant Makekau, with a Joseph Gehan, bought a .45 automatic pistol clip, as well as some .45 and .22 magnum ammunition. (D's Ex 11) "Joe" Gehan was shot down in Honolulu in May 1968 by "unknown". (Tr 4 at 96-98)

ported to Ventura that he had received reliable information that Ikari was offering $500 for anyone to pull Chico out of his house so they could kill him. (Tr 3 at 9; D's Ex 11)

Arrangements having been made by the State Probation Department, Chico was accepted at the Fort Worth Clinical Research Center on September 12, 1967, as a voluntary patient with legal pressure to follow release, i.e., supervision from the Hawaii State Probation office. (D's Ex 5 at 24) When Chico entered Fort Worth he was not on heroin. (See n. 2, *supra*) Chico was first placed in the withdrawal ward, then a few days later in the Population ward. Dr. Jurgensen, Deputy Chief of the Clinical Research Center, observed an indication that something might happen to Chico while in the Population ward of the hospital, stating that Chico "looked hot." (D's Ex 8 at 55) In the same ward with him at that time were seven or eight other patients from Hawaii.

On September 16, Clara, Chico's wife, informed Lee that she had received threatening phone calls. On September 18, she came to Lee's office and made a statement that she had received threatening phone calls from defendant Ikari, she stating that he as well as Makekau did not want Chico to testify and if he testified he and she and the family would get it; that a friend of hers had told her that defendant Makekau and the other defendants were trying to get someone to contract to kill Chico. On September 19, Clara Takashima was shot and killed in her own kitchen. (Tr 3 at 9-11)

On September 20, Fort Worth was notified that Chico's wife had been murdered and that Chico had been an informer, so Chico was immediately transferred to the maximum security ward in the hospital, as an internal decision of the hospital. (D's Ex. 5 at 26), "because we felt something might happen to him." (D's Ex 8 at 57) As Doctor Lacoyara, Chief of the Addiction Service at the Research Center, said:

> "We feel it best not to admit an informer for treatment because of obvious reprisals . . . Treatment of addiction is difficult enough without worrying about reprisals . . . Chico remained in the maximum security ward because of fear of placing him in Population where we had [eight] Hawaiian patients. This was a genuine fear that we have respecting any situation like this. If they [killed] his wife and we had some Hawaiian patients in [the hospital] there was a good possibility they might seek vengeance on Chico. (Ex 5 at 27-29).

On September 18, defendants had filed a motion for a bill of particulars, including a demand for the name of the informer. On September 19, the day of Clara's murder, the motion for a bill of particulars was heard and Chico's name was officially disclosed to the defendants. As indicated above, however, defendants already knew Chico had been the government's informer. At that hearing this court orally ordered that none of the defendants or their attorneys was to contact Chico.

On October 5, Lee reported to the U.S. Attorney that he had received reliable information that at-

tempts were being made to find someone to go to Fort Worth and murder Chico for a contract price of $15,000. Deputy U.S. Attorney Ventura characterized the reliability of this information as such as would measure up to the standards required for a search warrant. (Tr 3 at 11) On September 29, Dr. Jurgensen reported to the U.S. Marshal in Hawaii that Chico was in the safest part of the institution that they could find and that Chico wanted to go to the United States hospital at Lexington, Kentucky, or some other institution where he could be safe and away from Hawaiian addicts who knew that he had turned informer. (Tr 3 at 12) Dr. Jurgensen said that the problem was that Chico was a voluntary patient; there were no funds, and the only way he could be transferred would be if the government assumed protective custody of him. (Tr 3 at 12)

The U.S. Attorney's office, feeling that "it would be a good idea to move Chico out of Fort Worth", secured Chico's signed consent to be placed in protective custody and to waive any hearing. On October 6, the U.S. Attorney's office received further information from Dr. Lacovara who said that because of the other Hawaii addicts at the hospital they (the hospital) did not intend to keep Chico very long, and that they were going to turn him out. On October 9, 1967, the government presented to this court, and this court signed an order placing Chico in protective custody. On October 13, pursuant to the order, Chico was removed from the Fort Worth hospital to the Tarrant County Jail in Fort Worth, Texas, to be kept until further designation. (Tr 3 at 13)

The U.S. Attorney's office, by phone, attempted to get Chico back in the Fort Worth facility but permission was refused. Ventura also called the Bureau of Prisons seeking to transfer Chico to another institution. About three days after this request, the U.S. Marshal in Hawaii was notified by the Bureau of Prisons that Chico was not acceptable at the Lexington or Fort Worth or Springfield, Missouri facilities because of the danger involved, and the only place to which he could be transferred was to Terminal Island the federal penitentiary at Long Beach, California, and there held as if in jail. (Tr 3 at 13)

When this information was received, Ventura, with Chico's attorney Cushnie on a conference line, by phone informed Chico of the government's inability to transfer him to any place other than Terminal Island. Chico indicated he was afraid of that, because there were other Hawaii prisoners at Terminal Island. Both Chico and his attorney requested that further attempt be made to get him in to a treatment institution, and further requested that if such was unsuccessful that he be released from protective custody in jail. At this same time Chico promised the U.S. Attorney, his own attorney, and Lee, who was also on the line, that if released from protective custody he would keep them advised as to where he was staying, that he would be available for trial, and would immediately contact his State probation officer. (Tr 3 at 14) The next day the U.S. Attorney again called the Fort Worth clinic and talked to three doctors on a conference line. They advised Ventura that even though

they saw the urgency of the situation, nevertheless for morale purposes, because of the extreme danger there, at that time they could not take Chico back for the cure of narcotic addiction.

Thereafter, after consultation with Chico's attorney, the U. S. Attorney filed a motion to dismiss the protective custody order, together with an affidavit. The matter was heard ex parte by visiting Judge Wollenberg (N. D. Cal.) who on November 3, 1967, signed the order releasing Chico from protective custody, and on November 6 under that order Chico was released from the Tarrant County Jail. (Tr 3 at 15) The U. S. Attorney's office did not notify any of the defendants' counsel of this change of circumstances, but State Probation Officer Wong was notified, before the release, of the government's decision. (Tr 4 at 127)

One of the factors involved in the government's decision to remove the protective custody order was that the government did not feel that Chico should be in a penal institution[4] and it relied on Chico's promise to stay in touch.

On November 9, Lee, in Honolulu, received a letter from Chico stating he was staying at a hotel on 2nd and San Pedro Streets, viz., 241 E. 2nd Street, Los Angeles, California, i.e., in so-called "Jap town". He wrote that he did not need any protection at the time but if he did feel the need he would contact Lee. He

[4]Dr. Lacovara had, earlier, also felt that Chico should not be so detained because "leaving him locked up was not conducive to treatment." (D's Ex 5 at 30)

further wrote his only clothes were the ones on his back and that he had only $12 left; that he had a brother in Los Angeles who had moved and Chico did not know his new address.

Lee, on November 11, requested the Los Angeles office of the Bureau of Narcotics to contact Chico and assist him in locating his brother, and to give him any other necessary assistance. The Los Angeles Bureau of Narcotics office attempted but was unable to locate Chico, "Harold Takashima", at the Matsushima Hotel the address Chico had given. On November 13, Chico wrote to State Probation Officer Wong in Honolulu, giving his address as c/o F. Morita, 236 E. 2nd Street, Los Angeles (across the street from 241 E. 2nd). He enclosed with the letter his plane return ticket to Honolulu and requested Wong to cash it and then send him the money. (D's Ex 520).

On November 20, the government filed motions to set these cases for trial, the motions to be heard on November 27. On November 22, Makekau and Takahashi's attorney Cowan filed a motion that the United States produce Chico for the purpose of allowing Cowan to interview him a reasonable time (30) days prior to trial. The motion was supported by Cowan's own affidavit of the necessity therefor. This motion likewise was set for hearing on November 27.

By letter dated November 26 (D's Ex 523), Chico again wrote to Probation Officer Wong complaining that he had received no answer to his November 13 request that his plane ticket be cashed and the money

sent him. He told how he had to "sneak in my friend's room every night to sleep", borrow money to eat, and that he had gone hungry 1½ days. He also wrote that he was thinking of going to a culinary school for two weeks, where under a government sponsorship he would be paid $50 a week and then sent out on a job after two weeks. He said he needed clothes, bus fare, a room and at least one meal a day until he received his first pay check. On December 1, Wong mailed him a $100 money order (D's Ex. 52A) at the 211 E. 2nd Street address which Chico had used on the November 26 letter. That money order was cashed by Chico on December 6 at the Los Angeles branch of the Sumitomo Bank of California. (D's Ex 12B and C)

Meanwhile, the two above motions came on for hearing before visiting Judge William T. Sweigert (N.D.Cal.). The government advised the court that it would be of great assistance to the government if it could try the cases one after another before different juries, and suggested December 18, 1967, as the trial date. (Tr 1 at 3) Cowan then stated that "the only dates between now and April that I can possibly schedule [the trial] is on December 26th." (Tr 1 at 4) Without then ruling, Judge Sweigert took up Cowan's motion to produce. The United States objected to an interview by Cowan thirty days before trial. Although he did not precisely say so, the words of Ventura would lead one to infer that Chico was still in protective custody. Ventura advised the court that Chico's "life is in danger and we intend to bring him in one day before trial. . . . The witness will be in protective custody but [Cowan]

will have privacy in the United States Attorney's office." (Tr 1 at 5-6) Ventura repeated that the government could have Chico in Honolulu within one week and he continued: "We have [Chico] pretty well secluded and can bring him in" (Tr 1 at 7), but the government did not wish to bring him in and guard him for thirty days before trial.

Cowan, although previously insisting to the court that his calendar was completely filled from November 27 to April (except for December 26), nevertheless stated that he was ready to go to the mainland to interview Chico at any time. The government said it was ready for trial within one week.

Over objection of counsel for Makekau and Takahashi, and Piiohia, (Ikari's counsel was ill and was not present) Judge Sweigert set those two trials to start back to back on December 18. Judge Sweigert also ordered the government to have Chico available for a private interview by defendants' counsel at 9 o'clock in the morning of December 11 (Tr 1 at 16-17), Makekau and Takahashi's case to start, Piiohia's to trail, and it was expected that Ikari's would then trail that one. Attorney Cowan objected to the settings.

Judge Sweigert departed Hawaii, on November 29 Judge Pence was back on the bench, and on motion by defense counsel reviewed the problem of trial setting. Cowan again objected to the December 18 date but indicated he would be ready by February 12, 1968. Attorney Kimura, for Piiohia, joined in the request to trail after February 12, Ventura for the

government stated that it was ready to go to trial on December 18. "We are ready to produce that witness [Chico] on December 11", and he continued:

> "There is one further thing. We don't want too long a continuance. We have to take care of this witness. He doesn't have too much money. He is in a precarious position. The longer this stays pending, the longer his life stays in danger. . . ."

Cowan again insisted that he should be allowed to see Chico thirty days before trial and indicated again his willingness to go to the mainland for that purpose. Kimura, for Piiohia, did not propose to go to the mainland but indicated five days before trial to interview Chico would be suffieient. The court then reset the cases to start February 12 and orally ordered that the U. S. Attorney make Chico available to Cowan for interview at such place as was convenient to the United States some time during the week of January 15, 1968. (It was set for January 18, 1968, at the Bureau of Narcotics office in Los Angeles.) Cowan was instructed there would be no disclosure to his clients of the whereabouts of Chico. The court further ordered that the United States have Chico available in Honolulu at least five days before trial date for interview by Kimura. (Tr 2 at 7) The United States again objected to bringing Chico to Honolulu even five days before trial. Because, so Ventura stated; "[W]e have reliable information that there is $15,000 on Chico's head for anybody to bump him off. For this, we think it is an undue burden to protect him here for . . . five days." (Tr 2 at 8)

By letter dated November 27 Chico had written Lee that he was broke, wanted to contact his Probation Officer Wong; he was desperate; he had signed up for a school course, was going to try to make a new start; that he would be available for trial; and asked Lee to send him $10, stating: "I assure you I'll pay you back." (Tr 3 at 18) Lee immediately answered, and mailed Chico $10 out of his own pocket; writing Chico that he, Lee, was going to San Francisco in early December, that he would bring some clothes and send them down to the Los Angeles Bureau of Narcotics office for Chico and instructed Chico to be in the Bureau office on December 11 so that he, Lee, could talk to him on the phone. (Tr 3 at 18) On December 3, Chico again wrote Lee: "I'll of course be available for trial." (Tr 3 at 20) On December 8, Lee went to San Francisco and mailed clothes to Chico. (Neither Lee's letter nor package were ever returned to Lee.)

Since no Los Angeles Narcotic agent had as yet been able to contact Chico, Lee, from San Francisco, phoned to the Los Angeles office to make further attempts to contact Chico. (Tr 3 at 19) On December 11 at 11 A.M., Lee from San Francisco called the Los Angeles Bureau office but Chico did not show up. It was then that Lee first knew that he had lost track of Chico. (Tr 4 at 140)

The U. S. Attorney notified Cowan in early January that the government had lost contact with Chico, but Cowan insisted he was going to be at the Los Angeles Bureau office on January 18, 1968. (Tr 3

at 20) On January 11, Lee again wired Los Angeles to try further to locate Chico since Cowan was coming to the Los Angeles Bureau, and to recheck the 2nd and San Pedro Street area, as well as with Chico's brother's family. The Bureau found that "F. Morita" was on the Los Angeles police department's "Wanted" list for robbery. (D's Ex 31) It was subsequently discovered that when in November Chico had stayed at 241 E. 2nd, he had been known only as "Taki" and he had left no forwarding address. (D's Ex 25)

On February 5, this court held a pretrial hearing on all three cases. The government said it was ready to proceed to trial without Chico and announced that the government could not locate him. The defendants indicated they would move for a dismissal (as subsequently filed). (Tr 2A) At the February 8 hearing before this court, following the filing of the motions to dismiss, the government insisted that it was ready for trial, but stated that if the defense wanted a postponement the government did not object; and that the government would ask for a warrant of arrest of Chico as a material witness for the government and the defendants (Tr 3 at 22). Deputy U.S. Attorney Ventura saying they will get the FBI and any other federal agency, if possible, to look for Chico. (Tr 3 at 23) At the court's insistence that the defense make a decision between going to trial on February 12 as scheduled or asking for a continuance because of the need for Chico's testimony, the defendants advised the court that they needed the testimony of Chico more

than a trial on February 12, so consented that the first trial should go over until April 22. (Tr 3 at 28-29) Lee again notified his Los Angeles office to make even more effort to locate Chico and to notify the FBI. (D's Ex 30) A "Wanted" notice was placed with the FBI on March 15, 1968.

The trial of Criminal No. 12,274, *U. S. v. Fukumoto*, in this court, began on March 26, 1968, and on March 28, 1968, a mistrial was declared. Fukumoto's case arose out of government monitored sales by Fukumoto to Chico between June 15 and June 29, 1967. After the mistrial, at Fukumoto's insistence that Chico was a necessary witness for him, Fukumoto was permitted by this court to go to California to try to locate Chico. Fukumoto also gave the names of four persons, two of whom had criminal and narcotic records, as having information concerning Chico's whereabouts. Fukumoto thereafter reported to this court that he had heard that Chico had signed on a trawler in Los Angeles for Alaska fishing in February and March. (D's Ex 27, 28 and 34) The retrial of Fukumoto started on April 2, 1968, and some of Fukumoto's "informants" testified at a special hearing in the absence of the jury as to the sources of their purely hearsay information as to Chico's whereabouts. Before April 16, all persons named by Fukumoto and his witnesses were checked out or attempted to be located by the Narcotics Bureau agents in Los Angeles, who checked the bars, hotels and drug stores in the San Pedro and Wilmington dock areas (Los Angeles Harbor area), without any success. (D's Ex 34)

On May 31, Attorney Cowan hired a private detective agency in Los Angeles which thereafter covered the same general areas as the Bureau of Narcotics and produced similar results—no Chico! (D's Ex 57) By June, the Bureau of Narcotics had checked the fish canneries, maritime unions and jails in the Los Angeles area without turning up any trace of Chico. (D's Ex 26)

During the June 11, 1968, hearing on defendants' present motions, Attorney Cowan identified "F. Morita" as also being known as "Frank T. Hirai", then in the Los Angeles jail, and opined to the court that Hirai would know where Chico was. Hirai was interviewed by government agents in jail but he, too, said he had not seen or heard of Chico since November 1967. (D's Ex 56)

The Bureau sought aid from the Coast Guard station in Alaska to check out the Fukumoto rumor that he had turned fisherman, but by July 24 the Coast Guard could only report "no information" on Chico. (D's Ex 24; P's Ex 10) By August, the Bureau of Narcotics had searched and researched the 2nd and San Pedro Streets area and had checked with both "Randolph Yim", a hearsay-informant's name supplied by Cowan, who was found to be a federal prisoner in Terminal Island, as well as Chico's brother, Ed Takashima, but could discover no information of anyone seeing Chico after late November—early December 1967. (D's Ex 25)

In September 1968 the government checked out further "leads" tossed in by attorney Cowan, in

Bakersfield, California, and through the Northwest Mounted Police in the Vancouver area. (P's Ex 6 and 9)

As indicated above, the last place that Chico is known to have been was the Sumitomo Bank in Los Angeles, when he cashed the $100 money order on December 6, 1967.

The basic theory behind defendants' motion is loosely and verbosely set forth by attorney Cowan in Tr. 5, pages 42-47, and Tr. 6, pages 19, 67, 85-86. Although not precisely so stated by him, in essence defendants' claim is that the "totality of the evidence" shows that Chico was a special employee of the United States Government, and the circumstances surrounding his arrest and each and every one of his dealings with the government was such as to make him an employee of the government—whether the government paid him for his services in money, in favors, or other considerations; that there was a "deal" as shown by "the United States Government's deliberate . . . allowance of this man to disappear so that he would be unavailable for trial" (Tr. 6 at 19); that the government therefore must produce Chico for examination prior to trial, as well as in its case in chief, or suffer dismissal.

As the above findings indicate, there was not a scintilla of evidence, direct or circumstantial, from which this court could find that the United States paid Chico any money. There was likewise no evidence of any "deal" between Lee, Ventura, Borges, i.e., the government, and Chico, such as would or did make him,

the sense of *quid pro quo*, an employee of the government. The evidence discloses nothing from which this court could find that he was, in any legal sense, a paid informer of the government.

Lee's only promise to Chico was as set forth above:

> "Lee's only promises to Chico were that if he cooperated in assisting the government, then, while he, Lee, could not guarantee him anything, Lee would, however, bring the matter of Chico's cooperation to the attention of the U. S. Attorney's office and the U. S. Attorney's office would be advised of what Chico was doing." (*Supra*, p. 3.)

Since Chico was prosecuted by the State of Hawaii for the March 18, 1967, violation, there was no obligation on Lee's part to make any recommendation to the State, and he did not.

While the evidence does indicate that Chico had undisclosed sources of revenue apart from his wife's welfare money, there is absolutely no evidence that he received any of this directly or indirectly from the government. That the government was not conjuring up fears for Chico's safety in September is borne out, not only by the reliable information it received in September-October 1967 concerning threats not only to the life of the subsequently murdered Clara, but also to Chico, as well as the contracts for his death, but is further borne out by the observation of Dr. Jurgensen of the Fort Worth Research Clinic, who, as indicated *supra*, independently had observed that Chico appeared "hot"—before the hospital received word from Honolulu to the same effect.

The record can only lead to the conclusion that the government was sincere in its application for a restraining and protective custody order in early October 1967 and had good cause for the same. This court is convinced that the government honestly intended and believed that Chico would thereafter be replaced in Lexington or Springfield where his cure could be continued pending trial. That he could not be so placed was through no fault or lack of effort on the part of the United States Attorney's office.

The ultimate and humane decision to release Chico from the protective custody order which had incarcerated him in the Tarrant County Jail for about a month was made only after full consultation with Chico's attorney and Chico's request to be allowed out of jail. Lee, who had worked closely with Chico over a 4-5 months period, had justifiable reason to believe that Chico would fulfill his commitments to keep in touch with Lee and appear as a witness without being held in jail under warrant as a material witness. The government had made no agreement with the defendants' counsel that any of them would be notified if Chico's "protective custody" status was changed and had justification for secrecy as to Chico's whereabouts. The government had reason to fear that its problems of keeping Chico alive would not be simplified if Chico were returned to Hawaii and then held in jail awaiting and during trial.

The government's act of releasing Chico from protective custody was not a deliberate ploy to get rid of him or permit him to disappear. Nor was it a negli-

gent act, for the termination of the order was made only after full revelation to Judge Wollenberg, a judge of vast experience in the problems of narcotic cases, of the government's problems and dilemma. When on November 1967 the government moved for an immediate trial, the government had every right to believe that it would be able to fulfill its commitment to produce Chico as requested by defense counsel; and if the case had gone to trial on December 18, 1967, as set by Judge Sweigert on November 27, 1967, it appears, with most reasonable probability, that the present hearing would not have been made necessary. That it did not go to trial on December 18 was solely the responsibility and decision of the defendants' counsel, and the government cannot be faulted for it.

From that time on, the record indicates the government made many and intensive searches, following up and investigating all leads received by it during the succeeding seven months, in an endeavor to locate Chico.

While it appears that the government "has failed to comply with this court's orders to produce Chico Takashima for interview by the defendants", this failure has not come about through any negligent acts of the government. Hindsight might indicate that Lee placed more faith in Chico's written and oral promises than Chico's past record as a petty criminal and addict should have warranted. Nevertheless, all of Chico's acts before his December disappearance were such as make Lee's belief that Chico would keep his promises not unjustifiable or unreasonable. Until

Chico failed to show up in the Bureau of Narcotics office in Los Angeles at 11 A.M. on December 11, he had kept every promise and obeyed every instruction given to or by Lee.

Defendants' counsel have argued that it was unreasonable for the government to let an addict loose in Los Angeles. While Chico was certainly an addict under Dr. Jurgensen's definition "when we talk about being addicted we are talking about an inclination to abuse drugs . . . [and while at the time of his discharge Chico was still thus an addict], indeed the same would be true had he remained five years" (P's Ex 8 at 62)—Chico had been withdrawn from heroin for at least a month prior to hospitalization. He was in the clinic and jail in Fort Worth for an additional two months so that when released he had been withdrawn for at least three months. As Dr. Jurgensen said: "[Treatment] is of course highly individual. There are people in the hospital less than 31 days and never again use drugs." As stated above, there is nothing in the evidence to indicate that the government's humane decision to permit Chico out of the protective custody of jail and loose in Los Angeles was an unreasonable action or not made in good faith. In addition thereto, there is nothing in the record to indicate that Chico's addiction had anything to do with his disappearance.

While, of course, the government did not call upon each and every operative of the 36 departments of the United States Government which conduct investigational activities (P's Ex 11), the record indicates that

the government did use reasonable diligence in following up each and every lead no matter how flimsy the source, which might produce Chico. There is no evidence that the government has deliberately or negligently made Chico unavailable to testify in these cases. To the contrary, the "totality of the evidence" conclusively shows that the government's decisions re Chico were made in good faith and in equal good faith have been its efforts to obtain his presence in Hawaii for these cases.

Conclusions of Law

The law is well settled (and defendants acknowledge)[3] that the government is not an insurer or guarantor of an informer's appearance at trial. *Maguire v. U.S.*, 396 F.2d 327, 330 (9 Cir. 1968); *Williams v. U.S.*, 273 F.2d 781-79 Cir. 1959), *cert. denied* 362 U.S. 954 (1960); *Eberhart v. U.S.*, 262 F.2d 421 (9 Cir. 1958); *U.S. v. White*, 324 F.2d 814 (2 Cir. 1963); *U.S. v. Cimino*, 321 F.2d 509 (2 Cir. 1963), *cert. denied sub nom. D'Ercole v. U.S.*, 375 U.S. 967 (1964); *Cimino v. U.S.*, 375 U.S. 974 (1964); *U.S. v. D'Angiolillo*, 340 F.2d 453 (2 Cir. 1965), *cert. denied* 380 U.S. 955 (1965). While *Roviaro v. U.S.*, 353 U.S. 53 (1957) requires that the government identify its informant, there is no mandatory duty that the government produce the informant in each and every case. *U.S. v. Cimino, supra*, at 512. As was recognized in *Velarde-Villarreal v. U.S.*, 354 F.2d 9 (9 Cir. 1965), while approving *U.S. v. Clarke*, 220 F.Supp. 905, 909

[3]Makekau's Motion to Dismiss—Memorandum, p. 9.

(E.D.Pa. 1963), in common fairness it is the government's duty to produce an informer at trial or, failing that, to show that reasonable efforts to produce him were fruitless . . . in appropriate cases.

Before applying the applicable law to the facts found in the three instant cases, because of the "scatter gun" citations of defense counsel this court must point out what this case is *not*: (1) There is not here a contingent fee (cash) informer situation such as produced *Williamson v. U.S.*, 311 F.2d 441 (5 Cir. 1962), (2) or a paid informer as found in *Clingan v. U.S.*, 400 F.2d 849 (5 Cir. 1968), (3) or the situation where the informer had been promised dismissal of the case against him for his assistance to the government, as occurred in *U.S. v. Curry*, 284 F.Supp. 458 (N.D. Ill. 1968). Here is not (4) the non-disclosure of identity of informer as in *Roviaro v. U.S.*, *supra*, or *Pointer v. Texas*, 380 U.S. 400 (1965); or (5) non-disclosure of identity of informer without a government claim of witness unavailability, as concerned *U.S. v. Waters*, 288 F.Supp. 952 (D.Mass. 1968). Nor here do we have (6) a government informer refusing to be interviewed by defendants' attorney as in *Clingan v. U.S.*, *supra*, or *Dock v. U.S.*, 395 F.2d 89 (9 Cir. 1968); or (7) no effort being made by the government to secure the attendance at trial of the former co-defendant (who had "copped a plea" and given testimony that incriminated remaining defendant) who was in prison in a neighboring state as occurred in *Barber v. Page*, 390 U.S. 719 (1968); or (9) the testimony of a co-defendant taken at the preliminary

hearing being offered in evidence against the defendant upon a simple showing that the co-defendant had moved to California from Texas and did not intend to return, as was the case in *Pointer v. Texas, supra.*

The instant cases are not too dissimilar to the facts existing in *Cerda v. U.S.*, 391 F.2d 219, 220 (9 Cir. 1968)[6] where "appellant's counsel relied (and properly so) on the representations of government counsel that the government intended to produce an informer as a witness for the prosecution. Neither side subpoenaed the witness, and he disappeared prior to the trial." The appellate court sustained the district court's action of proceeding to trial upon finding that there was no proof the government had caused the witness' disappearance and there was proof that the government had made a reasonable effort to locate the missing witness.

These present cases also have certain points of similarity with *U.S. v. Truesdale*, 400 F.2d 620 (2 Cir. 1968), in which the defendant claimed his trial was prejudicially unfair because his counsel had timely requested the production at trial of a "special employee" informant of the Narcotics Bureau in a heroin sale case, and had been misled as to the informant's availability to defense counsel by government counsel, both before and during the trial. Defendant contended that being so misled, his own search for the informant was thereby delayed and that this delay, so occasioned,

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[6]The Honorable Judge Ely who wrote the dissent in *Velarde, supra*, was on the panel that unanimously affirmed the district court's ruling in *Cerda*.

prevented the defense from obtaining the witness and prejudicially deprived the defendant of a fair trial. The court did but reaffirm the underlying rule that "Indeed, ultimately, each case turns on its own peculiar circumstances", and said:

> "We do not agree [with contentions of defense counsel]. The trial judge was satisfied from the representations made to him by government counsel and from the agents' sworn testimony that the Government had made a conscientious effort to locate the informer during an intensive and extensive seven-week search. We are constrained to accept the trier's estimate of the situation and circumstances here present that an earlier search would have been equally fruitless." (Citations omitted.) 400 F.2d at 622.

Not dissimilar also were the facts in *U.S. v. Guerra*, 334 F.2d 138 (2 Cir. 1964), where the defendants were convicted of unlawfully selling narcotics, etc., to a "special employee" informant, and *Guerra* asserted that a fair trial was precluded by the non-appearance of the special employee. The narcotics agent in charge was called to the stand for the express purpose of explaining the government's attempts to locate the informer. The evidence indicated that several federal agents had expended more than 100 hours in an effort to find him. The court stated:

> "Not only did both prosecution and defense issue subpoenas to compel . . . [the informer's] appearance, but a week's adjournment of the trial was granted so that the informer might be located. Under these circumstances, the decision to pro-

ceed in his absence was hardly an abuse of discretion." 334 F.2d at 142.

As the preceding facts make manifest, the government did not secure the order for protective custody of Chico for the purpose of preventing defendants' attorneys from examining him, or to prevent disclosure of any facts concerning his connection with the charges against the several defendants. The United States Attorney's office was justified in its action, not only by the statements of Chico himself at the end of August 1967 concerning threats allegedly made by at least one of the instant defendants, as well as by the statement of Clara of threats allegedly made by that same defendant and others, but also by the gunning down of Clara shortly after Chico's departure.

The court can but note that the defendants could at any time after September 19, 1967, have subpoenaed Chico as a witness. That they did not, of course, was based on their reliance upon the government's statement, made honestly and in good faith, that Chico would be available for interview before trial and at the time of the trial itself. At the time in November when the government honestly believed that it would be able to produce Chico for that purpose, defense counsel Cowan insisted that he needed an interview at least 30 days before trial. While it is recognized that the defendants have a right to interview government's witnesses, *Callahan v. U.S.*, 371 F.2d 658 (9 Cir. 1967), no counsel has a "right" to any "30 days before trial" interview. The record, of course, does not show exactly when or from what cause Chico disappeared from the

Los Angeles scene. Thus, no one could say with certainty whether or not Chico could have been produced as a witness a week prior to the December 18, 1967, trial setting. But for the insistence of defendants that trial be delayed, however, the problem would have reached its acute position within a few days after Chico cashed the money order on December 6—at a time when all leads would have been much fresher than they were when the disappearance of Chico was brought into full focus at a much later date.

Under the facts of this case, this court can but conclude that neither the defendants nor the government are to be faulted for the disappearance and apparent non-availability of Chico. The government, and, too, defendants' counsel, have made extensive and conscientious efforts to locate Chico. Both sides must perforce go to trial without the claimed benefits of his testimony.

No court denies the right granted to an accused by the Sixth Amendment to confront the witness against him. We do not have at this stage the problem of the introduction of any possible testimony of Chico. We only have the fact that Chico has not been and as of this date is not, apparently, available for appearance as a witness for any one. All that *Velarde*, *supra* (at 12), demands is that the government should be required to demonstrate its inability through reasonable efforts to produce the missing Chico. All that was demanded by the court in *Curry*, *supra* (at 468), was an explanation by the government for its failure to produce the key informer, or a showing of reasonable

efforts to locate the informer in order to comply with the court's direction to produce. The government here has fulfilled those legal obligations in every respect.

Defendants' motions to dismiss the indictments and suppress the testimony of government witnesses are DENIED in each and every case.

Dated: Honolulu, Hawaii, this 24th day of February, 1969.

Martin Pence
United States District Judge

Filed in the United States District Court,
District of Hawaii, February 24, 1969.
Walter A. Y. H. Chinn, Clerk.
By David H. Hisashima, Deputy.

Appendix B

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, v. Kenneth A. Makekau and Yoichi Takahashi, Defendants-Appellants.	No. 24,358

[July 22, 1970]

Appeal from the United States District Court
for the District of Hawaii

Before: Jertberg, Browning, and Hufstedler, Circuit Judges.

Per Curiam:

Defendant Makekau was convicted of selling heroin in violation of 21 U.S.C. § 174 and 26 U.S.C. § 4704 (a). Defendant Takahashi was convicted of violating section 4704(a). We affirm both convictions.

Defendants contend that they were denied effective assistance of counsel by a pretrial order limiting their counsel's access to the government informer who made the purchases in the transactions for which they were indicted. The order instructed the government to dis-

close the informer's identity to the defendants but forbade both defendants and their counsel from "directly or indirectly contact[ing] or attempt[ing] to contact [the informer] without prior authorization in writing of this Court."

Federal Rule of Criminal Procedure 16(e) authorizes district courts to issue protective orders limiting discovery "[u]pon a sufficient showing." In this instance the order was amply justified by the prosecuting attorney's representations that threats had been made against the lives of the informer and his family and that his wife had been murdered after receiving such threats. In the ordinary case, the informer may be afforded sufficient protection by an order limiting disclosure of his whereabouts to defense counsel. *United States v. D'Angiolillo*, 340 F.2d 453, 455 n.3 (2d Cir. 1965). Here, however, the demonstrated risk of death justified the further requirement that counsel obtain prior court authorization so that steps might be taken to assure that the informant's location would not be disclosed to others inadvertently.

Defendants urge that the district court erred in denying their motions to dismiss and to suppress the testimony of the government's principal witness when the government failed to comply with a court order to produce the informant-purchaser just prior to the date set for trial. The district court held an evidentiary hearing on these motions and wrote an extensive opinion. The court recognized that "in common fairness it is the government's duty to produce an informer at trial or failing that, to show that reasonable

efforts to produce him were fruitless. . . ," but concluded that "[u]nder the facts of this case, . . . neither the defendants nor the government [was] to be faulted for the disappearance and apparent non-availability of [the informer]." The standard which the court applied was proper (*see United States v. Causler*, 419 F.2d 952, 954 (7th Cir. 1969); *Velarde-Villarreal v. United States*, 354 F.2d 9, 12 (9th Cir. 1965); *United States v. Guerra*, 334 F.2d 138, 142 (2d Cir. 1964); *cf. Cerda v. United States*, 391 F.2d 219 (9th Cir. 1968)), and the court's factual finding is amply supported by the record.

Defendants complain because the court refused the following instruction relating to the non-appearance of the informer:

> "You are instructed that the rule in criminal cases is that if a party has it peculiarly within his power to produce a witness whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony if produced would be unfavorable."

Since the district court found on sufficient evidence that the witness was unavailable to the government, the instruction was properly rejected as not applicable to the facts of this case. *See, e.g., World Wide Automatic Archery, Inc. v. United States*, 356 F.2d 834, 837 (9th Cir. 1966); 2 Wigmore, Evidence § 286 (3d ed. 1940).

Defendants' remaining contentions do not warrant discussion.

Affirmed.

Appendix C

21 UNITED STATES CODE § 174

§ 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, §§ 1, 5(f), 65 Stat. 767; July 18, 1956, c. 629, Title I, § 105, 70 Stat. 570.

Appendix D

26 UNITED STATES CODE § 4704(a)

§ 4704. Packages

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Appendix E

42 UNITED STATES CODE § 1306

§ 1306. Disclosure of information in possession of Department of Health, Education, and Welfare or Department of Labor; compliance with requests for information and services

(a) No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act or under subchapter E of chapter 1 or subchapter A of chapter 9 of Title 26, or under regulations made under authority thereof which have been transmitted to the Secretary of Health, Education, and Welfare or to the Secretary of Labor, as the case may be, by the Commissioner of Internal Revenue, and no disclosure of any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare, or the Secretary of Labor, or by any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor, in the course of discharging their respective duties under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, or from any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor, shall be made except as the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, may by regulations prescribe.

Any person who shall violate any provision of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both.

(b) Requests for information, disclosure of which is authorized by regulations prescribed pursuant to subsection (a) of this section, and requests for services, may, subject to such limitations as may be prescribed by the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, to avoid undue interference with their respective functions under this chapter, be complied with if the agency, person or organization making the request agrees to pay for the information or services requested in such amount, if any (not exceeding the cost of furnishing the information or services), as may be determined by the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be. Payments for information or services furnished pursuant to this section shall be made in advance or by way of reimbursement, as may be requested by the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, and shall be deposited in the Treasury as a special deposit to be used to reimburse the appropriations (including authorizations to make expenditures from the Federal Old-Age and Survivors Insurance Trust Fund, the Federal Disability Insurance Trust Fund, the Federal Hospital Insurance Trust Fund, and the Federal Supplementary Medical Insurance Trust Fund) for the unit or units of the Department of Health, Education, and Welfare or the Department

of Labor, as the case may be, which furnished the information or services.

(c) (1) (A) Upon request (filed in accordance with paragraph (2) of this subsection) of any State or local agency participating in administration of the State plan approved under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, or participating in the administration of any other State or local public assistance program, for the most recent address of any individual included in the files of the Department of Health, Education, and Welfare maintained pursuant to section 405 of this title, the Secretary shall furnish such address, or the address of the most recent employer, or both, if such agency certifies that—

(i) an order has been issued by a court of competent jurisdiction against such individual for the support and maintenance of his child or children who are under the age of 16 in destitute or necessitous circumstances,

(ii) such child or children are applicants for or recipients of assistance available under such a plan or program,

(iii) such agency has attempted without success to secure such information from all other sources reasonably available to it, and

(iv) such information is requested (for its own use, or on the request and for the use of the court which issued the order) for the purpose of obtaining such support and maintenance.

(B) If a request for the most recent address of any individual so included is filed (in accordance with paragraph (2) of this subsection) by a court having

jurisdiction to issue orders or entertain petitions against individuals for the support and maintenance of their children, the Secretary shall furnish such address, or the address of the individual's most recent employer, or both, for the use of the court (and for no other purpose) in issuing or determining whether to issue such an order against such individual or in determining (in the event such individual is not within the jurisdiction of the court) the court to which a petition for support and maintenance against such individual should be forwarded under any reciprocal arrangements with other States to obtain or improve court orders for support, if the court certifies that the information is requested for such use.

"(2) A request under paragraph (1) of this subsection shall be filed in such manner and form as the Secretary may prescribe (and, in the case of a request under paragraph (1) (A), shall be accompanied by a certified copy of the order referred to in clauses (i) and (iv) thereof).

(3) The penalties provided in the second sentence of subsection (a) of this section shall apply with respect to use of information provided under paragraph (1) of this subsection except for the purpose authorized by subparagraph (A) (iv) or (B) thereof.

(4) The Secretary, in such cases and to such extent as he may prescribe in accordance with regulations, may require payment for the cost of information provided under paragraph (1) of this subsection; and the provisions of the second sentence of subsection (b) of this section shall apply also with respect to payment under this paragraph.

Appendix F

No. 26017
United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Kenneth A. Makekau and Yoichi Takahashi, Defendants-Appellants.	Civil No. 24358

PETITION FOR WRIT OF MANDAMUS to Be Directed to the Chief Judge of the Central District of California, or Alternatively Petition for Extraordinary Relief

Stuart M. Cowan,
Old Primo Brewery Building,
837 Cooke Street,
Honolulu, Hawaii 96813,
Attorney for Defendants-Appellants.

I hereby certify that a copy of the within was personally delivered to U. S. Attorney Joseph Gedan on 6/18/70 at his last known address.

S. M. Cowan,
Attorney for Defendants-Appellants.

No. 26017

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Kenneth A. Makekau and Yoichi Takahashi, Defendants-Appellants.	Civil No. 24358

PETITION FOR WRIT OF MANDAMUS

to Be Directed to the Chief Judge of the Central District of California or Alternatively Petition for Extraordinary Relief

Come now defendants-appellants Kenneth A. Makekau and Yoichi Takahashi, by their attorney, Stuart M. Cowan, and hereby move this Honorable Court pursant to Rule 21 of the Federal Rules of Appellate Procedure for a Writ of Mandamus directed to the Chief Judge of the Central District of California commanding said Judge forthwith to issue a bench warrant for the immediate arrest of Harold Chico Takashima to be held without bail in protective custody as a material witness in the above entitled matter for interview by counsel for defendants-appellants.

Alternatively, these defendants-appellants move for extraordinary relief in the nature of the forthwith

issuance of a bench warrant from this court for the immediate arrest of the said Harold Chico Takashima to be held without bail in protective custody as a material witness for interview by counsel for defendants-appellants.

This petition is based upon the following facts:

1. Defendants-appellants were convicted in the United States District Court for the District of Hawaii of the sale of heroin to one Harold "Chico" Takashima, a government informer. One of the principle issues involved in defendants-appellants' appeal was the unavailability of that witness for interview and at trial, and the efforts of the government to retain custody of him and thereafter to locate him upon his disappearance.

2. The witness Takashima is in possession of material evidence as to the transactions between him and the defendants-appellants herein as well as to his whereabouts since December 6, 1967.

3. On June 15, 1970, Stuart M. Cowan, attorney for defendants-appellants, was advised by Joseph Gedan, Assistant U.S. Attorney, that Harold "Chico" Takashima had been arrested in Los Angeles on a larceny charge (a copy of the affidavits of Stuart M. Cowan and Janet C. Laurence are attached hereto as Exhibits A and B and incorporated herein by reference setting forth the facts surrounding that conversation).

4. On June 16, 1970, the said Joseph Gedan informed the said Stuart M. Cowan that Harold

"Chico" Takashima would appear in Division 31 of the Municipal Court of Los Angeles at 9:00 a.m. June 17, 1970 (a copy of the affidavit of Janet C. Laurence relative to that conversation is attached hereto as Exhibit C and incorporated herein by reference).

5. Counsel for defendants-appellants requested the U.S. Attorney forthwith to arrest the said Takashima as a material witness for interview by defendants-appellants' counsel but was advised that the United States would not do so.

6. The relief prayed for should be granted because the said Harold "Chico" Takashima is still a material witness as to the facts of the case and as to his whereabouts since his disappearance (bearing both upon the merits of the case and the appeal) and his testimony would constitute new evidence and would be grounds for reversal of defendants-appellants' conviction.

7. The only court having jurisdiction over the person of Harold "Chico" Takashima is this Honorable Court.

8. If the relief herein prayed for is not granted, petitioner believes that the said Harold "Chico" Takashima will again disappear and be unavailable to explain the circumstances surrounding the alleged transactions with defendants-appellants, the circumstances surrounding his disappearance and his whereabouts since December 6, 1967. For these reasons it is in the best interests of justice that the warrant be issued forthwith.

Wherefore, petitioner prays as follows:

1. A Writ of Mandamus issue from this Court directed to the Chief Judge of the Central District of California commanding said Judge to issue a bench warrant for the immediate arrest of Harold "Chico" Takashima to be held without bail;

2. Alternatively, defendants-appellants pray for extraordinary relief in the form of a bench warrant issued from this Court for the immediate arrest of said Harold "Chico" Takashima to be held without bail.

Dated: Honolulu, Hawaii, this 17th day of June, 1970.

Stuart M. Cowan,
Old Prime Brewery Building,
837 Cooke Street,
Honolulu, Hawaii 96813
Attorney for Defendants-Appellants.

State of Hawaii
City and County of Honolulu—ss.

Stuart M. Cowan, being first duly sworn on oath deposes and says that: He is the petitioner named in the foregoing petition, he has read said petition, knows and understands the contents thereof, and that the same are true.

Stuart M. Cowan, Petitioner

Subscribed and sworn to before me this 17th day of June, 1970.

(Seal)

Richard A. Williams,
Notary Public, First Circuit
State of Hawaii
My Commission Expires: 2/27/72

Exhibit A

AFFIDAVIT

State of Hawaii
City and County of Honolulu—ss.

Stuart M. Cowan, after being first duly sworn on oath deposes and says that:

1. He is one of the attorneys for the defendants Kenneth A. Makekau and Yoichi Takahashi;

2. At 8:45 a.m. on June 15, 1970, he was contacted by U.S. Attorney Joseph Gedan, by telephone and informed that Harold "Chico" Takashima would be available in Los Angeles on June 17, 1970, and that he was sending Deputy U.S. Attorney Harold Fong to Los Angeles to interview Takashima;

3. Affiant informed Mr. Gedan that affiant would be in Los Angeles on June 18th and that Takashima be made available for interview by affiant at the time;

4. Affiant was informed that Takashima would probably not be around on the 18th and that affiant should be in Los Angeles on the 17th, a date which affiant finds impossible to make due to prior commitments;

5. Affiant informed Mr. Gedan that there was still an outstanding bench warrant for the arrest of Takashima as a material witness and that the bench warrant had never been revoked;

6. Mr. Gedan indicated a preference not to execute said bench warrant whereupon affiant informed Mr. Gedan to go see Judge Pence and get a new bench warrant;

7. Mr. Gedan said he might go to see the judge.

Further affiant sayeth naught.

Stuart M. Cowan, Affiant.

Subscribed and sworn to before me this 17th day of June, 1970.

Richard A. Williams
Notary Public, First Circuit
State of Hawaii

My Commission Expires: 2/27/72

Exhibit B

AFFIDAVIT

State of Hawaii
City and County of Honolulu

Janet C. Laurence, being first duly sworn on oath deposes and says that:

1. She is employed by the law firm of Cowan, Frey & Williams as secretary for Stuart M. Cowan;

2. On June 15, 1970, she placed a return telephone call to Mr. Joseph Gedan, U.S. Attorney for Mr. Cowan;

3. A short time after passing the call through to Mr. Cowan she was instructed to pick up the telephone and listen in on the conversation;

4. Mr. Cowan asked Mr. Gedan if he (Mr. Cowan) was correct in understanding that Harold "Chic" Takashima would be available in Los Angeles on June 17, 1970; Mr. Gedan said that was correct;

5. Mr. Cowan informed Mr. Gedan that he would be in Los Angeles on the 18th and would like to talk to Mr. Takashima at that time;

6. Mr. Gedan said that he was sending Deputy U.S. Attorney Harold Fong to interview Mr. Takashima on the 17th and that Mr. Cowan should be there then as most likely Mr. Takashima would not be around the 18th;

7. Mr. Cowan told Mr. Gedan that there was a bench warrant out on Mr. Takashima and to arrest him;

8. Mr. Gedan seemed hesitant about doing this and questioned whether or not it was still a valid warrant;

9. Mr. Cowan assured Mr. Gedan that the bench warrant was still valid but that if he had doubts he should go see the judge and have a new one issued; Mr. Gedan seemed reluctant to do this but said he might go see the judge;

Further affiant sayeth naught.

Janet C. Laurence, Affiant

Subscribed and Sworn to before me this 17th day of June, 1970.

(Seal)

Richard A. Williams
Notary Public, First Circuit
State of Hawaii

My Commission Expires: 2-27-72

Exhibit C

AFFIDAVIT

State of Hawaii
City and County of Honolulu—ss.

Janet C. Laurence, being first duly sworn on oath deposes and says that:

1. She is employed by the law firm of Cowan, Frey & Williams as secretary for Stuart M. Cowan;

2. On June 16, 1970, she was instructed to pick up the telephone and listen in on a conversation between Stuart M. Cowan and a man who identified himself as Joseph Gedan;

3. Mr. Gedan informed Mr. Cowan that Harold "Chico" Takashima was due to appear in court in Los Angeles on June 17, 1970, on a larceny charge but he did not know what court it was;

4. Mr. Cowan asked Mr. Gedan to try to find out which court it was in and Mr. Gedan said he would do this (Mr. Gedan later called informing Mr. Cowan of the time and place of the court appearance of Harold "Chico" Takashima);

5. Mr. Cowan asked Mr. Gedan to have "Chico" arrested at that time and Mr. Gedan said he would not as he felt "Chico" is no longer need since the trial is over;

6. Mr. Gedan said that he had seen Judge Martin Pence in the hallway and told the judge that he (Mr. Gedan) no longer considered "Chico" a material witness and did not want him;

7. Mr. Gedan told Mr. Cowan that if he wanted "Chico" arrested he would have to make appropriate motion to the court.

Further affiant sayeth naught.

Janet C. Laurence, Affiant

Subscribed and Sworn to before me this 17th day of June, 1970.

(Seal)

Richard A. Williams
Notary Public, First Circuit
State of Hawaii

My Commission Expires: 2/27/72

Filed June 19, 1970,
Wm. B. Luck, Clerk

United States Court of Appeals
for the Ninth Circuit

No. 26,017

United States of America,
Plaintiff-Appellee,
vs.
Kenneth A. Makekau and
Yoichi Takahashi,
Defendants-Appellants.

ORDER

Before: JERTBERG, BROWNING and HUFSTEDLER,
Circuit Judges

Defendants-appellants' petition for writ of mandamus or for extraordinary relief is denied.

Dated: June 29, 1970.

Filed June 29, 1970.
Wm. B. Luck, Clerk.

Appendix G

State of California,
County of Los Angeles.

DECLARATION OF HAROLD TOMIHARU TAKASHIMA

I declare under penalty of perjury that the following statement is true:

I was born in Honolulu, Hawaii, January 22, 1925, am a widower and am presently residing in Los Angeles, California.

Some time in September, 1967, I was arrested in Honolulu for possession of heroin. As a result of that arrest, I was taken from Honolulu in September 1967 to Fort Worth, Texas by a Honolulu probation officer for the cure. I was considered a narcotics addict at that time.

On November 6, 1967 I was released from that facility in Fort Worth, Texas, and on the same day flew to Los Angeles, California at my own expense, and have remained here ever since. I have not left the City of Los Angeles for even one day since November 6, 1967.

During this period I have lived at the Matsushima Hotel, 241 E. Second St., Los Angeles and since January 1968 I have always lived and now live in Room 216 of the New York Hotel, 305 E. Second St., Los Angeles.

Some time around December 17, 1967 I began working as a fabric cutter for California Sample Co. on

South Figueroa in Los Angeles, and am still working there now, earning $68.00 a week take home pay. I think my gross before deducting Social Security and other taxes is around $86.00 a week. My Social Security Number is 576-18-3436.

Since I came to Los Angeles on November 6, 1967, I have never been contacted by any officer or official of any Federal Government department or agency and no one has talked to me about any court cases in Honolulu or anywhere else.

Given and signed at Los Angeles, California June 23, 1970.

/s/ Harold Takashima

Appendix H

Appearances:

Mr. James F. Ventura represented the Government.

Mr. Stuart M. Cowan represented the defendants Makekau and Takahashi.

Mr. Robert Kimura represented Defendant Piiohia, not a party to this action. Incorporated for the purpose of motion.

Reported by: Albert Grain, Official Court Reporter on November 27, 1967, before the Honorable William T. Sweigart, Judge.

EXCERPTS TAKEN FROM TRANSCRIPT 2b

Transcript 2b, page 5, line 21 to page 7, line 19:

MR. VENTURA: Your Honor, this witness is on the mainland. He has been keeping out of sight. His life is in danger. And we intend to bring him in one day before trial. We feel it is sufficient time to interview the witness. I don't think it is our duty to make witnesses available thirty [6] days before trial. We will fix a date sometime a week before trial where the Defendant will have an opportunity to interview the witness. The witness will be in protective custody. But he will have privacy and that ought to take care of it.

MR. COWAN: Your Honor, to make my position absolutely clear on this subject, I have asked for the privilege to interview and I offered to go to wherever this witness was or wherever the Government wanted to make him available,

whether it is on the mainland, where he was kept in protective custody or under any conditions that the Court might feel are just, because I think I need more than three or four days before trial for this witness and for some other information and prepare my case. And I still make that offer. I will go to wherever that witness is and at whatever location.

THE COURT: Where do you want to make him available?

MR. VENTURA: In my office.

THE COURT: Here?

MR. VENTURA: Yes. We have some problems. We want to get him in and out in the shortest possible time. I would suggest a Monday or Tuesday trial date so we can get him, so that he can get him the day before.

THE COURT: What is the earliest date you can have him here so that Counsel has an opportunity to interview him? You can do it now? Or any time, you say?

MR. VENTURA: I could get him here in a week. But [7] then, am I going to have to keep him here for three weeks?

THE COURT: No.

MR. COWAN: That is why I suggested to go to the mainland.

THE COURT: There is no use for your going to the mainland. They are willing to bring him here.

MR. VENTURA: We have him pretty well secluded and can bring him in.

THE COURT: You want to bring him before the trial?

MR. VENTURA: Yes.

THE COURT: And not bring him and then bring him back, that sort of thing?

MR. VENTURA: That's correct, your Honor. I believe we have gone beyond what we have to.

THE COURT: Could you bring him here and could he be kept a week?

MR. VENTURA: It could be if your Honor ordered it, but I would prefer not to because we have difficulty. We have three different cases.

Page 12, line 24 to page 13, line 12:

THE COURT: Well, we will let you see the witness, we are going to arrange for that, within a week before the **[13]** trial, so that you can interview him. If he wants to interview him now, can he go to the mainland if he wants to interview him earlier?

MR. VENTURA: We would prefer not to, your Honor. We have this witness in a spot where no one knows where he is. And we would prefer to keep him that way. He is in a city where no one knows where he is, and we would like to keep him that way.

MR. COWAN: Why don't you transport him to another city and then bring him to Honolulu? I don't care where you keep him. I represent to the Court that I wouldn't make a disclosure where this interview takes place.

Page 15, line 23 to page 16, line 15:

THE COURT: Well, can you have the Defendant here prior to December 18th to make him available to Counsel—not the Defendant but when can you have this witness, Takahashi, **[16]** here?

MR. VENTURA: We would like to do it on the 15th, Friday.

THE COURT: You will have to do it before that time. Can you have him here available to the Defendant to interview him anytime that the Defendant selects during the week prior to the trial?

MR. VENTURA: We can do it. If your Honor orders it, I can do it, I can do it. I don't want to mislead—I can do it.

THE COURT: You make him available any day in the preceding week. He is to be available in this courthouse, made available for a private interview by the Defendant's Counsel. Have you any particular date in that week, Monday, Tuesday, Wednesday, Thursday or Friday?

Appendix I

Appearances:

Mr. James F. Ventura represented the Government.

Mr. Stuart M. Cowan represented the defendants Makekau and Takahashi.

Mr. Robert Kimura represented defendant Piiohia, not a party to this action. Incorporated for the purpose of motion.

Reported by: Diamna W. Orndoff, Official Court Reporter on November 29, 1967, before the Honorable Martin Pence, Judge.

EXCERPTS TAKEN FROM TRANSCRIPT 2c

Transcript 2c, page 1, line 25 to page 2, line 3:

MR. KIMURA: The problem on these three cases, your [2] Honor, is that the prosecution has had the principal witness held in protective custody and his big problem is to set them so that the three trials can run more or less back to back.

Page 2, lines 16 to 25:

MR. VENTURA: The trial has been set for December 18 at our request. We are, of course, ready and willing to go to trial on December 18. We are ready to produce that witness on December 11. There is one further thing. We don't want too long a continuance. We have to take care of this witness. He doesn't have too much money. He is in a precarious position. The longer this stays pending, the longer his life stays in

danger, the longer he can't settle, the more it costs the Government; and we are interested in trying three cases at one time.

Page 3, line 20 to page 4, line 14:

MR. COWAN: Here's one of the problems, your Honor. I had made a motion to produce this witness so that we could talk to him and I asked for thirty days before trial so that I can speak with him and then assimilate the information and prepare my case.

THE COURT: At the time you made the motion, the witness [4] was on the mainland in the hospital.

MR. COWAN: I had offered to go to the mainland at any place where counsel would like to make him available, not necessarily where they are keeping him, and I would give my word not to disclose where the interview took place or anything along that line so that I could get some reasonable amount of time.

THE COURT: Was that statement of yours presented in court?

MR. COWAN: Yes. It's in the form of an affidavit in the motion I made, and Judge Sweigert said, "Well, you can have five days or so before the trial." I don't consider that sufficient time to interview this witness and assimilate the information.

Page 5, line 19 to page 6, line 22:

THE COURT: . . . when are you going to the mainland?

MR. COWAN: I would like to go probably sometime in January, probably the week of the 15th of January, I think about the 19th or 20th.

THE COURT: I will put it like this. Is that the week of the 19th?

MR. COWAN: The week of the 15th.

[6] THE COURT: All right. If you wish to interview this witness during the week of the 15th, any time during that Monday to Friday week beginning January 15, at such place as the United States Attorney will make him available to you, leave will be granted for you to interview him under your representation that there will be no disclosure to any of your clients or anyone else outside of just simply your own office staff who is tightly bound to this secrecy as to where the witness may be found in the mainland. The United States Attorney will make him available at the time that is convenient and Mr. Cowan will be given the opportunity to interview the witness without anyone else present.

MR. VENTURA: Yes, your Honor.

THE COURT: There's one other thing. When the witness is here, Mr. Cowan will be given the opportunity with his client again to interview the witness with his client present.

MR. VENTURA: I have an objection to that.

MR. COWAN: That may even be in the Marshal's office.

THE COURT: I am saying that you will be given the opportunity so that the question cannot be raised later that your client had no opportunity to assist you in the examination of this witness.

Page 7, lines 22 to 24:

MR. VENTURA: I might point out the reasons. We have a difficult time protecting this fellow. His life is in great danger and his wife was killed.

Appendix J

Cross-Examination of Assistant U. S. Attorney, JAMES VENTURA, by STUART M. COWAN, counsel for defendants Makekau and Takahashi on September 30, 1968, taken from Transcript 7, commencing page 53 through page 55. Reported by Diana W. Orndoff, Official Court Reporter, U. S. District Court, District of Hawaii.

Q. And where was [Takashima] at the time, to the best of your understanding?

A. When I talked to him?

Q. Yes.

A. He was in Texas, the name of the . . . . He was at the Marshal's Office, I think, the United States Marshal's Office.

Q. And was this before or after he was released from protective custody?

A. This was before he was released from protective custody.

Q. How long before?

A. One day or two days or three days. I am just not sure exactly. The days could be up to a week.

Q. And was it at this time that you decided to petition the Federal Court to release this man from custody?

A. Well, if you are referring that it was at that moment specifically and just because of this specific thing that I decided, I can't answer that yes, but it was around that time that I did come to the decision to petition the Federal Court.

Q. At the time he was released from protective custody, I take it you were aware of the

fact that he was a key witness in these other cases which were then pending.

A. Certainly.

Q. *And you were aware also that somewhere along the line either the United States Government was going to call him or counsel for these various defendants were going to want to talk to him, right?*

A. *I think I informed you a couple of times that I was going to call him.*

Q. Do you remember when the last time you advised me that you were going to call him as a witness in your case in chief?

A. I think it was in court here, my last appearance as United States Attorney in this case, where I assured you and I assured the Court that if I could get my hands on Chico Takashima he would be here to testify.

Q. When was it that you first advised me that Chico Takashima was released from custody or had been released from custody?

A. I don't recall the exact date.

Q. It was approximately the beginning of January, wasn't it?

A. It could have been. I don't know when it was. It could have been.

Q. That was when I was making arrangements to go to Los Angeles and visit with him, true?

A. It could have been. I don't recall what the months were.

Q. *At any rate, up to that time, you had always assured me that you were going to call Mr. Takashima as a witness, that's true?*

THE COURT: After that time.

A. Up to the last appearance as United States Attorney, I assured you that I would and, if I tried the case today and they brought me back, I would assure you again.

Q. Up to the time that I was advised for the first time that Mr. Takashima was now numbered among the missing, you had always assured me that he would be here, that's true?

A. That's true, and even after.

Appendix K

Appearances:

Mr. Michael D. Hong represented the Government.

Mr. Stuart M. Cowan represented defendants Makekau and Takahashi.

Reported by: Dianna W. Orndoff, Official Court Reporter, U. S. District Court, Honolulu, Hawaii, on September 3, 1968.

EXCERPTS TAKEN FROM TRANSCRIPT 6

Page 146, line 4 to page 147, line 3:

MR. COWAN: Your Honor, I'd like to make a request of the Court at this time that perhaps may be complied with by the next time we meet. The thought has occurred to me that I can write to the Post Office Department and find out when and where and by whom that document was checked and I am wondering if, in addition, the Court might advise or ask the United States Attorney's Office in their official capacity to write to the Department. . . .

THE COURT: Well, just ask him right now.

MR. COWAN: Mr. Hong, and Mr. Hayashi who is present here, if you would make a request of the Social Security Office in Washington, D.C., to find out whether or not any wages have been paid to Mr. Harold Takashima under his normal Social Security number; and, if so, when and where. This might

(line 18 missing)

THE COURT: Presupposing they haven't got it, then what?

MR. COWAN: They would not give that information to me, your Honor.

THE COURT: You might even find out where this money order was cashed.

MR. COWAN: That's right. I'm going to write to [147] the United States Post Office Department.

THE COURT: The United States will do that for you.

MR. COWAN: Thank you, your Honor.

Appearances:

Mr. Joseph Gedan represented the Government.

Mr. Stuart M. Cowan represented Defendants Makekau and Takahashi.

Reported by Albert Grain, Official Court Reporter on October 2, 1968.

EXCERPTS TAKEN FROM TRANSCRIPT 8

Page 97, lines 8 to 22:

THE COURT: Do you have any information to the Court on this?

MR. GEDAN: Your Honor, I called the Chief Postal Inspector, and he informed me that pursuant to a telegram he expects the information almost any time, he expects it tomorrow morning. But I have told him that in the event it doesn't come in the morning's mail, I have instructed him to call, make a telephone call to whoever is necessary. With regard to the Social Security Administration, your Honor, I think starting early tomorrow, with a series of telephone calls I can determine what, if any, information might be obtained.

THE COURT: So you feel that within the next 48 hours you will be able to report to Counsel and to the Court?

MR. GEDAN: Yes, your Honor.

Appendix L

Exhibit "A"

GSA TELETYPE Oct. 9 19 48 '68 HST

Received Oct. 3, 1968, U.S. Attorney, District of Hawaii.

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JUSD
FM WILLIAM E RYAN CHF NARCOTIC AND
DANGEROUS DRUG SEC DOJ WASHDC
TO JOSEPH GEDAN ASST US ATTY HONO-
LULU HAW
BT

Re your inquiry concerning Harold, Tomiharu Takashima. Disclosure of information contained in the files of the Social Security Administration is forbidden by law except as permitted by regulation. See 42 USC 1306. It is our information from previous contacts with administration that disclosure of information is permitted only in prosecutions for violation of provisions of the Social Security Act. Should the Court desire specific reference to regulations, please advise.

Appendix M

In the United States District Court
for the District of Hawaii

CR. NO. 12,254

United States of America,

vs.

Kenneth A. Makekau and Yoichi Takahashi,

Defendants.

ORDER

Stuart M. Cowan,
Suite 1316 Ala Moana Building,
1441 Kapiolani Boulevard,
Honolulu, Hawaii 96814,
Attorney for Defendants.

Breenstein, Cowan & Carlsmith,
Of Counsel.

Filed in the United States District Court, District of Hawaii, Oct. 6, 1967, at 9 o'clock and 35 min. A.M.

Walter Y. H. Chinn, Clerk.
By Ray T. Sakai, Deputy.

In the United States District Court
for the District of Hawaii

CR. NO. 12,254

United States of America,
vs.
Kenneth A. Makekau and Yoichi Takahashi,
Defendants.

ORDER

This matter having come on for hearing on defendants' motion for a Bill of Particulars, and good cause appearing therefore,

It Is Hereby Ordered that,

1. With regard to Counts I, III, and V, plaintiff inform the defendants of the exact place wherein each offense is alleged to have been committed,

2. The name of the person to whom defendants are alleged to have sold said drugs.

It Is Further Ordered that,

Neither of the defendants nor defendants' counsel shall directly or indirectly contact or attempt to contact the person whose name is supplied as hereinabove ordered without prior authorization in writing of this Court.

It Is Further Ordered, that

The Court will sign, upon presentation by Counsel for the United States, through the defendants, an Order placing the person whose name is supplied under protective custody until further ordered by this Court.

Dated: Honolulu, Hawaii, this 5 day of October, 1967.

/s/ Martin Pence,
Judge.

Approved as to form:
James F. Ventura,
Assistant U. S. Attorney.